Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

_____ Term, 1976.

No. 76-579

THEODORE G. SPENCER, et al., Appellants

v.

REDEVELOPMENT AUTHORITY OF THE
CITY OF NANTICOKE, Appellee

ON APPEAL FROM THE SUPREME COURT
OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

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October 26, 1976

INDEX

		Page
I.	Introductory Paragraph.....	1
II.	Reference to Opinions of Courts Below.....	1
	A. Pennsylvania Supreme Court Appeal.....	1
	B. Pennsylvania Commonwealth Court Appeal.....	1
	C. Luzerne County Court of Common Pleas.....	1
III.	Grounds of Jurisdiction.....	1
	A. Nature of the Proceeding.....	1
	B. Date of Order From Which Appeal is Taken.....	2
	C. Statute Sustaining Jurisdiction of Supreme Court.....	2
	D. Cases Sustaining Jurisdiction of Supreme Court.....	2
	E. The Statutes Involved.....	3
	F. Other Statutes.....	7
IV.	Questions Presented by Appeal.....	10
V.	History of the Case.....	11
	A. Prior Proceedings.....	11
	B. Facts Material to Questions Presented.....	12
	C. Federal Questions Raised and Passed on.....	17

		Page
	1. 26 P.S. §602, denial of just compensation and equal protection of the laws.....	17
	2. 26 P.S. §1-601A(b)(3), denial of just compensation.....	22
	3. Lack of relocation assistance requirement violative of Federal Law.....	24
VI.	Federal Questions Substantial.....	27
	A. §1-602 as violative of just compensation and equal protection guarantees.....	27
	1. Argument and Holdings Below.....	28
	2. Operation of §1-602.....	30
	3. Denial of Just Compensation.....	31
	4. Denial of Equal Protection.....	33
	B. §1-601A(b)(3), business dislocation limit violative of just compensation guarantee.....	36
	1. Argument and Holdings Below.....	36
	2. Denial of Just Compensation.....	38
	C. 26 P.S. §1-407(a), lack of requirement for relo-	

cation assistance repugnant to federal law..... 40

D. Necessity for Review..... 41

APPENDICES

APPENDIX A: Decision of the Luzerne County Court of Common Pleas

APPENDIX B: Opinion of the Pennsylvania Commonwealth Court

APPENDIX C: Order of the Supreme Court of Pennsylvania

APPENDIX D: Notice of Appeal to United States Supreme Court

TABLE OF CITATIONS

I. Cases

Case Name and Citation	Page
Armstrong v. U.S. 364 U.S. 46, 80 S.Ct. 1563 (1960).....	39
Graham v. Richardson, 403 U.S. 365, 91 S.Ct. 1848 (1971).....	2,33, 36,38
Hanson v. Unified Sch. Dist. No. 500, Wyandotte Cty., Kan., 364 F.Supp. 330 (D. Kan., 1973).....	3
Hawkins v. Town of Shaw, Mississippi, 461 F.2d 1171 (5th Cir. 1972).....	3,33
Hicks v. Miranda, 95 S.Ct. 2281 (1975).....	3
Huffman v. Pursue, Ltd., 95 S.Ct. 1200 (1975).....	3
Jones v. District of Columbia Redevelopment Land Agency, 499 F.2d 502 (D.C. Cir. 1974).....	41
Latham v. Volpe, 455 F.2d 1111 (9th Cir. 1971).....	41
Moritz v. C.I.R., 469 F.2d 466 (10th Cir. 1972).....	3
Moyer Eminent Domain Appeal, ____ Pa. Commonwealth ____; 349 A.2d 781 (1976).....	27,41

Potomac Electric Power Co. v. Fugate, 341 F.Supp. 887 (E.D. Va. 1972), aff'd. 409 U.S. 943, 93 S.Ct. 290 (1972)..... 3,36

Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251 (1971)..... 2

Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322 (1969)..... 2,32, 36

Walters v. Edwards, 396 F.Supp., 808 (E.D. La., 1975)..... 3

Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064 (1886)..... 2,33

II. Statutes and Constitutions

28 U.S.C. §1257(2)..... 2

Pennsylvania Eminent Domain Code of 1964, Special Session, June 22, P.L. 84

§402; 26 P.S. §1-402..... 2

§406; 26 P.S. §1-406..... 2

§406(a); 26 P.S. §1-406(a)..... 11

§407(a); 26 P.S. §1-407(a)..... 7,10, 40,41

§601; 26 P.S. §1-601..... 19,39

§601A(b)(3); 26 P.S. §1-601A (b)(3)..... 5,10, 22,23, 24,36-39,40 43

§602; 26 P.S. §1-602..... 10,17, 19,21, 27-30, 33,42

§602(a); 26 P.S. §1-602(a)..... 3

§602(c); 26 P.S. §1-602(c)..... 4,32, 34,35 42

§602(d); 26 P.S. §1-602(d)..... 4,17, 28,32, 34,42

Pennsylvania Urban Redevelopment Law of 1945, May 24, P.L. 991

§12; 35 P.S. §1712..... 2

Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (P.L. 91-646, Jan. 2, 1971)

§205(a); 42 U.S.C. §4625(a)..... 26

§205(c)(3); 42 U.S.C. §4625 (c)(3)..... 26

§205(c)(4); 42 U.S.C. §4625(c) (4)..... 26

§210; 42 U.S.C. §4630..... 7,10, 26,41

United States Constitution

Amendment V (Just Compensation Clause)..... 8,38, 40

Amendment XIV (Equal Protection Clause) 9,38

III. Rules and Regulations

Department of Housing and Urban Development Regulations for Relocation Payments and Assistance

§42, 24 CFR 42.10 26

I. Appellants, Theodore G. Spencer, Anna A. Spencer, and Theodore G. Spencer trading and doing business as Ted Spencer & Sons Auto Service Center, appeal from the final order of the Supreme Court of Pennsylvania entered July 27, 1976, denying appellants' Petition For Allowance of Appeal, and in support of the appeal submit this Jurisdictional Statement.

II. Reference to Opinions of Courts Below

A. Redevelopment Authority of the City of Nanticoke v. Theodore G. Spencer et al., _____ Pa. _____ (1976); _____ A.2d _____ (1976).

B. Redevelopment Authority of the City of Nanticoke v. Theodore G. Spencer et al., _____ Commonwealth Ct. _____ (1976); 350 A.2d 422 (1976).

C. Redevelopment Authority of the City of Nanticoke v. Theodore G. Spencer et al., Court of Common Pleas of Luzerne County, No. 272 of 1974 (April 2, 1975). Unreported.

III. Grounds of Jurisdiction

A. This suit was brought to condemn appellants' property as part of a

flood control urban renewal project pursuant to Section 12 of the Pennsylvania Urban Redevelopment Law of 1945, May 24, P.L. 991, 35 P.S. §1712; and §402 of the Pennsylvania Eminent Domain Code of 1964, Special Session, June 22, P.L. 84, 26 P.S. §1-402. Appellants filed preliminary objections to the take pursuant to §406 of the Pennsylvania Eminent Domain Code of 1964, Special Session, June 22, P.L. 84, 26 P.S. §1-406 on the grounds that it violated the Constitution and was repugnant to the laws of the United States.

B. The order appealed from was dated and entered on July 27, 1976. The Notice of Appeal was filed on October 22, 1976, in the Supreme Court of Pennsylvania.

C. Jurisdiction of this appeal lies in this Court pursuant to 28 U.S.C. §1257(2).

D. Cases sustaining the jurisdiction of this Court are:

Shapiro v. Thompson, 394 U.S. 618, 89 S. Ct. 1322 (1969)

Graham v. Richardson, 403 U.S. 365, 91 S. Ct. 1848 (1971)

Yick Wo v. Hopkins, 118 U.S. 356, 6 S. Ct. 1064 (1886)

Reed v. Reed, 404 U.S. 71, 92 S. Ct. 251 (1971)

Hicks v. Miranda, 95 S. Ct. 2281 (1975)

Huffman v. Pursue, Ltd., 95 S. Ct. 1200 (1975)

Moritz v. C.I.R., 469 F.2d 466 (10th Cir. 1972)

Hawkins v. Town of Shaw, Mississippi, 461 F.2d 1171 (5th Cir. 1972)

Hanson v. Unified Sch. Dist. No. 500, Wyandotte Cty., Kan., 364 F. Supp. 330 (D. Kan., 1973)

Potomac Electric Power Co. v. Fugate, 341 F. Supp. 887 (E. D. Va. 1972), aff'd. 409 U.S. 943, 93 S. Ct. 290 (1972)

Walters v. Edwards, 396 F. Supp. 808 (E.D. La., 1975)

E. State statutes, the validity of which appellants challenge as violative of the Constitution and laws of the United States, are:

1. Pennsylvania Eminent Domain Code of 1964, Special Session, June 22, P.L. 84, §602(a); 26 P.S. §1-602(a); Volume 26-29, 1976 Supplement, p. 71:

   "(a) Just compensation shall consist of the difference between the fair market value of the condemnee's entire property interest immediately before the condemnation and as unaffected thereby and the fair market

value of his property interest remaining immediately after such condemnation and as affected thereby, and such other damages as are provided in this code."

2. Pennsylvania Eminent Domain Code of 1964, Special Session, June 22, P.L. 84, §602(c); 26 P.S. §1-602(c); Volume 26-29, 1976 Supplement, p. 71:

"(c) In case of the condemnation of property in connection with any program or project which property is damaged by floods, the damage resulting therefrom shall be excluded in determining fair market value of the condemnee's entire property interest therein immediately before the condemnation."

3. Pennsylvania Eminent Domain Code of 1964, Special Session, June 22, P.L. 84, §602(d); 26 P.S. §1-602(d); Volume 26-29, 1976 Supplement, p. 71:

"(d) In the case of property which was damaged by the floods of September, 1971 and June, 1972, an acquring agency may acquire the entire property interest of a condemnee, except any improvements made since the date of the floods, and reconvey to the condemnee a portion of the property interest taken; in which case the damage shall be the difference between the value of the

property interest acquired, excluding flood damage, and the value of the property interest reconveyed. For the purposes of this act, all mobile homes which were in use as dwellings and were destroyed, demolished or damaged beyond reasonable repair by the natural disasters of September 1971 and June 1972 shall be considered to be real property."

4. Pennsylvania Eminent Domain Code of 1964, Special Session, June 22, P.L. 84, §601A(b)(3); 26 P.S. §1-601A(b)(3); Volume 26-29, 1976 Supplement, pp. 100-101:

"(b) Any displaced person who is displaced from his place of business or from his farm operation shall be entitled, in addition to any payment received under subsection (a) of this section, to damages for dislocation of such business or farm operation as follows:

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"(3) In addition to damages under clauses (1) or (2) of this subsection, damages of not more than ten thousand dollars ($10,000) nor less than twenty-five hundred dollars ($2,500), in an amount equal to either (i) forty times the actual monthly rental, in the case of a tenant, or forty times

the fair monthly rental value, in the case of owner-occupancy; or (ii) the average annual net earnings, whichever is greater. For the purposes of this subsection, the term 'average annual net earnings' means one-half of any net earnings of the business or farm operation before Federal, State, and local income taxes, during the two taxable years immediately preceding the taxable year in which such business or farm operation moves from the real property acquired for such project, and includes any compensation paid by the business or farm operation to the owner, his spouse, or his dependents during such period. The regulations promulgated under section 604-A may designate another period determined to be more equitable for establishing average annual net earnings provided the designation of such period does not produce a lesser payment than would use of the last two taxable years. In the case of a business, payment shall be made under this subsection only if the business (i) cannot be relocated without a substantial loss of its existing patronage, and (ii) is not a part of a commercial enterprise having at least one other establishment not being acquired by the acquiring agency, which is engaged in the same or similar business."

5. Pennsylvania Eminent Domain Code of 1964, Special Session, June 22, P.L. 84, §407(a); 26 P.S. §1-407(a); Volume 26-29, 1976 Supplement, p. 33:

"(a) The condemnor, after the expiration of the time for filing preliminary objections by the condemnee to the declaration of taking, shall be entitled to possession or right of entry upon payment of, or a written offer to pay to the condemnee, the amount of just compensation as estimated by the condemnor. If a condemnee thereafter refuses to deliver possession or permit right of entry, the prothonotary upon praecipe of the condemnor shall issue a rule, returnable in five days after service upon the condemnee, to show cause why a writ of possession should not issue, upon which the court, unless preliminary objections warranting delay are pending, may issue a writ of possession, conditioned upon payment to the condemnee or into court of such estimated just compensation and on such other terms as the court may direct."

F. Other statutes involved in the case:

1. Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, P.L. 91-646, Title II, §210, Jan. 2, 1971; 42 U.S.C. 4630:

"Notwithstanding any other law, the head of a Federal agency shall not approve any grant to, or contract or agreement with, a State agency, under which Federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the displacement of any person on or after January 2, 1971, unless he receives satisfactory assurances from such State agency that--

(1) fair and reasonable relocation payments and assistance shall be provided to or for displaced persons, as are required to be provided by a Federal agency under sections 4622, 4623, and 4624 of this title;

(2) relocation assistance programs offering the services described in section 4625 of this title shall be provided to such displaced persons;

(3) within a reasonable period of time prior to displacement, decent, safe, and sanitary replacement dwellings will be available to displaced persons in accordance with section 4625(c)(3) of this title."

2. United States Constitution, Amendment V (Just Compensation Clause):

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

3. United States Constitution, Amendment XIV (Equal Protection):

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

IV. Questions Presented by Appeal

A. Does 26 P.S. §1-602, as construed by the Pennsylvania courts, violate the 5th Amendment right to just compensation of the appellants, who have made post-flood improvements to their subsequently condemned property, in that it fails to provide for payment of their flood losses.

B. Does 26 P.S. §1-602, as construed by the Pennsylvania courts, violate the equal protection clause of the United States Constitution in that it affords compensation for flood losses to condemnees who have made no post-flood improvements to their properties but does not afford such compensation to condemnees, including appellants, who have made such improvements.

C. Does 26 P.S. §1-601A(b)(3) constitute a denial of the 5th Amendment right to just compensation in that the $10,000.00 limitation it imposes on business dislocation damages fails to justly compensate the appellants whose business dislocation losses exceed $10,000.00 and who will be unable to relocate their business.

D. Where, as here, an urban renewal project is 75% funded through HUD, is 26 P.S. §1-407(a) repugnant to §210 of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, P.L. 91-646, Jan. 2, 1971; 42 U.S.C. 4630, in that it entitles the

condemnor to possession of the appellants' property without any requirement that the condemnor provide relocation assistance to the appellants.

V. History of the Case

A. Prior Proceedings

This action arose out of the condemnation of appellants' property as part of a flood related urban redevelopment project in the Lower Broadway area of the City of Nanticoke in Luzerne County, Pennsylvania.

A Declaration of Taking was filed by the appellee (Redevelopment Authority of the City of Nanticoke) on January 14, 1974, and on February 4, 1974, the appellants were served with a Notice of Declaration of Taking, the Declaration of Taking, and a Notice to Quit the Premises. On March 5, 1974, the appellants filed preliminary objections to the Declaration of Taking in the Luzerne County Court of Common Pleas pursuant to §406(a) of the Pennsylvania Eminent Domain Code of 1964; 26 P.S. §1-406(a). The Court heard argument on the pleadings , depositions and exhibits. The Court en banc entered its decision and order on April 2, 1975. This is reproduced in full in the record (Tr. 1027a-1045a) and attached hereto. A timely notice of appeal to the Pennsylvania Commonwealth Court was filed by appellants. The trial court decision was

affirmed by the Commonwealth Court in an opinion by President Judge Bowman, filed January 23, 1976. A copy of the Commonwealth Court decision is attached hereto. A petition for allowance of an appeal was timely filed in the Supreme Court of Pennsylvania by appellants and was denied, per curiam, on July 27, 1976. This appeal follows.

B. Facts Material to Questions Presented

The undisputed facts pertinent to the issues are as follows:

The appellants, Theodore G. Spencer and his wife, Anna Spencer, are the owners in fee of all the property subject to the Declaration of Taking which was challenged by preliminary objection below. The Declaration of Taking (Tr. 6a-7a) claims title to 4.5 acres of the 10-acre property. Mr. Spencer operates an automobile junk yard on the property and sells new and used auto parts, doing business under the name of Ted Spencer and Sons Auto Service Center. In addition, the Spencers reside on the property. The property fronts on Lower Broadway (a main thoroughfare in the City of Nanticoke). A second junk yard is adjacent to it. In the immediate vicinity are other commercial activities.

The Spencer property is located within a flood control urban renewal project known as the Lower Broadway Disaster Urban Renewal Area Pa. R.-668(c).

The project is 75% funded by the Federal government (through the Department of Housing and Urban Development) and 25% funded by the Commonwealth of Pennsylvania (through the Department of Community Affairs). The project was undertaken as a flood control project following damages inflicted in the area by Hurricane Agnes and the resultant flooding in June 1972. The project lies in that portion of the City of Nanticoke which is relatively close to the Susquehanna River and received varying degrees of water in the 1972 floods, though none of the structures were "wiped out" (Walsh deposition, Tr. 155a).

In the immediate post-flood period, through late 1972, there was considerable confusion and uncertainty as to what urban renewal or other post-flood relief would be available. For example, on September 19, 1972, the Redevelopment Authority wrote to the City of Nanticoke and advised that Nanticoke was low on the priority list for funds and there was considerable doubt about

receipt of funds (Walsh deposition, Tr. 164a; Appellants' Exhibit 11, Tr. 796a-798a).[1/]

With no definitive information available concerning the future of their properties, some of the homeowners began shortly after the flood to rebuild and

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[1/] The resolution declaring the subject area blighted was not presented by the Nanticoke Urban Redevelopment Authority to the Nanticoke Planning Commission for its approval until October 31, 1972. The Planning Commission certified the area as a redevelopment area the following day (Appellants' Exhibit 16(a), Tr. 812a-814a); but the project was not approved by the Redevelopment Authority until March 21, 1973. The Part 1 and 2 Application to HUD for Federal funding of the project was approved by the Planning Commission on April 4, 1973 (Appellants' Exhibit 18, Tr. 820a). The project was approved by the Nanticoke City Council on April 16, 1973. Parts 1 and 2 of the Application to HUD were submitted to HUD on May 29, 1973, and approved by HUD on July 2, 1973. The project was approved by the State Department of Community Affairs on August 23, 1973, over a year after the flood.

move back in; others chose to leave their properties and remain in trailer parks for their temporary housing (Spencer deposition, Tr. 382a-383a). Those who repaired and rebuilt their properties did so with the aid of SBA loans which they obtained for that purpose (Walsh deposition, Tr. 135a, 155a).

The division in opinion among owners in the project area as to the desirability of having their properties acquired generally falls along the lines of those who have repaired and moved back into their homes and do not wish their property taken, and those who have not repaired their homes and desire condemnation (Walsh deposition, Tr. 157a; Spencer deposition, Tr. 382a-383a). The Redevelopment Authority has acquired by negotiation some 30 parcels of property from owners who do not oppose the project. The appellants are among those who have made repairs to their property following the flood damage. The estimated just compensation arrived at by the Redevelopment Authority for the Spencer property was $125,000.00, based on fair market value at the time of the condemnation. Following the flood, Spencer had spent $51,000 on rehabilitation of his real property and $80,000 on equipment for his business (Spencer deposition, Tr. 381a-391a).

Some 75% of Spencer's business is derived from retail sale of new and used auto parts and for this aspect of his business he requires proximity to a

populated area, highway access, and high visibility. The other 25% of the business is comprised of wholesale sale of crushed car bodies, for which a railroad siding is required (Spencer deposition, Tr. 380a, 385.1a-387a). The 5.5 landlocked acres with which Spencer would be left following condemnation is inadequate for the functioning of his business (Spencer deposition, Tr. 375a, 385.1a). Relocation outside Nanticoke would result in a loss of approximately 45% of Spencer's total business (Spencer deposition, Tr. 378a).

Spencer has been unable to find a feasible relocation site for his business despite (1) advertisement, (2) the assistance of a real estate expert, (3) inquiries to zoning officials, and (4) inquiries to and request for assistance from the Redevelopment Authority (Spencer deposition, Tr. 374a-378a). It will be virtually impossible for Spencer to find a relocation site in the Greater Wilkes-Barre area with the characteristics necessary to accommodate his business (Poggi deposition, Tr. 395a, 405a-406a). The appellee has given Spencer no assistance in finding a relocation site.

Spencer is 51 years old, has no education beyond the eighth grade, has worked in no business other than the kind in which he is presently engaged since 1948, and knows no other business, profession, or occupation (Spencer deposition, Tr. 373a).

C. Federal Questions Raised and Passed On

1. 26 P.S. §602, denial of just compensation and equal protection of the laws

Appellants first raised the question of the operation of 26 P.S. §1-602 as being violative of the just compensation and equal protection guarantees of the Constitution in ¶31 of their Preliminary Objections (their initial responsive pleading) to the appellee's Declaration of Taking in the Luzerne County Court of Common Pleas. Appellants contended that §1-602(d) prohibited the taking of any post-flood improvements in calculating just compensation thereunder and that, if it did not, §1-602 as a whole would deny appellants just compensation and equal protection by denying them pre-flood value for their property while providing pre-flood value compensation to condemnees who had made no post-flood improvements to their properties.

The trial court denied this preliminary objection, stating at p. 11 of its Decision:

> "Condemnees' assertion that Section (d) prohibits the acquisition of post-flood improvements appears contrary to clear language of the Section (d) providing that the agency may 'acquire' and 'reconvey.'

***

"E. This objection alleges that Section 602 of the Eminent Domain Code denies condemnees equal protection of the laws in that they are not properly reimbursed for post flood improvements as applied to a property owner who makes no improvements and gets pre-flood value.

"This objection is without merit. Section 602(a) of the Eminent Domain Code (26 P.S. 1-602) provides:

> 'Just compensation shall consist of the difference between the fair market value of the condemnee's entire property interest immediately before the condemnation and as unaffected thereby and the fair market value of his property interest remaining immediately after such condemnation and as affected thereby....'

"The above section provides that condemnees will receive the fair market value as determined on the date of the condemnation which value would include post flood improvements."

(Decision of Judge Hourigan, April 2, 1975, p. 11)

Appeal to the Commonwealth Court of these challenges to the operation of §1-602 was on the record of the trial court proceding, including the Preliminary Objections, and the questions were before that court without having to be otherwise raised. Appellants argued these issues in their Brief, pp. 26-40.

The Commonwealth Court in its Opinion of January 23, 1975, at pp. 3-5, passed on the constitutional challenges to §1-602 as follows:

> "Appellants next attack, Section 602(c) of the Code, 26 P.S. §1-602, as denying to them the equal protection of the law in that these provisions afford to condemnees of property damaged by flood the before flood value of their property when taken within certain time frames in connection with a flood prevention project or other public programs.
>
> "From this obvious intent of the legislature to afford to flood victims a recovery of the flood damages suffered by their property if it is taken for a flood prevention program or other public project, appellants fashion a want of equal protection to them and others who restored their flood damaged properties on the theory that those who did not restore their properties will receive more than the precondemnation

value of their property, whereas appellants and others similarly situated will receive only their precondemnation value for the taking. This they contend is a want of equal protection of their fundamental (constitutional) right to just compensation for property taken or, alternately, their equal protection rights are violated for want of rational basis for the state action in favoring those who did not restore their flood damaged properties.

"[7,8] Although somewhat ingenious, these arguments on analysis are not persuasive. The provisions of Section 602(c) do not in any manner diminish or impair appellants' entitlement to just compensation as constitutionally guaranteed to them and as recognized in Section 601 of the Code, 26 P.S. §1-601, the measure of damages for the taking being the fair market value of their property immediately before the condemnation and as unaffected by it. The appellants are, therefore, assured the fair market value of their property including the post-flood improvements made thereto. That other property owners in the project may receive something more by way of compensation for the taking of their property does not, directly or indirectly, impair appellants' constitutional

(fundamental) right to just compensation.

"[9,10] Nor do we find in this legislation a want of equal protection to appellants disassociated from their fundamental right to just compensation which itself is unimpaired. In this category there cannot be and the constitution does not require equal protection of law to all persons under all circumstances. The state action here taken to aid flood victims under the limited conditions and circumstances prescribed as part of a flood project or other public program in which the Federal, State and local governments participate in planning, executing and financing, evidences a rational and socially desirable, objective of financial aid for rehousing and relocation of flood victims incident to a public program designed to overcome a future similar disaster. Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974). The order of the lower court is affirmed and the proceedings hereby remanded."

Appellants continued to maintain the just compensation and equal protection challenges to §1-602 in their Petition for Allowance of Appeal to the Supreme Court of Pennsylvania (Petition for Allowance of Appeal, pp. 6-14). By the order appealed from here, entered

July 27, 1976, the Supreme Court of Pennsylvania denied appellants' Petition, without comment, thereby sustaining the decision of the Commonwealth Court.

2. 26 P.S. §1-601A(b)(3), denial of just compensation

Appellants first raised the question of the $10,000.00 limit of §1-601A(b)(3) on business dislocation losses as violating the just compensation guarantee of the Constitution in ¶13-15 of their Preliminary Objections (their initial responsive pleading) to appellee's Declaration of Taking, in the trial court. Appellants contended therein that their business dislocation losses would exceed the $10,000.00 limit and they therefore could not receive just compensation for the take.

Holding that the question was improperly raised by preliminary objection, the trial court declined to decide the issue, deferring decision to a later stage of the proceedings, stating at p. 4 of its Decision:

> "In view of the above-quoted paragraph it appears that the issue of just compensation must be raised at the Board of View and/or trial of the case when the court would then act and determine condemnees' claim for just compensation."

The appellants' challenge to the constitutionality of §1-601A(b)(3) as set out in their Preliminary Objection was carried forward to the Commonwealth Court by appeal, without having to be raised anew there. It was argued in appellants' Brief in the Commonwealth Court, pp. 16-26. The Commonwealth Court (Opinion of January 23, 1975, pp. 2-3) passed on the question as follows:

> "[3-6] We agree that this issue, framed in constitutional terms or otherwise, was improperly raised under Section 406 of the Code. We would further observe that the inability to relocate one's business taken in condemnation cannot vitiate or negate the power of condemnation otherwise enjoyed by the Authority nor does the cost of such relocation, if relocation is possible, enlarge one's constitutional entitlement to just compensation. See Sgarlat Estate v. Commonwealth, 398 Pa. 406, 158 A.2d 541, cert. denied, 364 U.S. 817, 81 S.Ct. 49, 5 L.Ed.2d 48 (1960). Appellants' argument is singularly lacking in citation of any authority, Federal or State, that the cost of relocating a business is an element of damages in ascertaining just compensation constitutionally required to be paid under the power of eminent domain. That the legislature has seen fit to provide for such payments subject to the expressed

conditions and limitations found in Section 601-A(b)(3) does not enlarge one's constitutional right to just compensation for property taken."

Appellants preserved their just compensation challenge to §1-601A (b)(3) in their Petition for Allowance of Appeal (pp. 23-26) to the Supreme Court of Pennsylvania. By the order appealed from here, entered July 27, 1976, the Supreme Court of Pennsylvania denied appellants' Petition, thereby sustaining the decision of the Commonwealth Court.

3. Lack of Relocation Assistance Requirement Violative of Federal Law

In the trial court, appellants first raised the issue of the appellee's failure to provide appellants with any relocation assistance while taking steps to force appellants' immediate dislocation in ¶50 of their Preliminary Objections (their first responsive pleading) to appellee's Declaration of Taking. Appellants there contended that the failure to provide relocation assistance violated applicable federal regulations with regard to displacement of persons in a federally funded project.

The trial court denied this preliminary objection in its Decision of April 2, 1975, stating at

pp. 18-19 thereof:

"B. The Redevelopment Authority has taken immediate steps to force the immediate dislocation of condemnees, without providing any relocation assistance as required by Urban Renewal Law and regulations.

'The thrust of the statute and the regulations is that no right to relocation assistance arises until the property is, in fact, acquired by the agency through condemnation or sale or until a contract for purchase of the property is signed. There is no entitlement to relocation benefits or assistance unless and until the property is acquired by the agency. Thus, the argument that the condemnation is unlawful because the relocation provisions were not followed cannot be logically asserted, since condemnation, or sale, is a prerequisite to eligibility for relocation benefits.'

Condemnation of 4150-52 E. Thompson S., 64 D. & C. 2d 306, 309, 310 (1973

"We have the same sentiments for the Spencers as was expressed by the Commonwealth Court in Leo Realty Co. v. Redevelopment Authority

of Wilkes-Barre, 13 Pa. Commonwealth Ct., 288, 292 (1974):

> 'Although we sympathize with Leo concerning the predicament in which it finds itself (the record establishes that there is a scarcity of property which could be used for Leo's purposes in the City of Wilkes-Barre, thereby making relocation difficult or even impossible). We are powerless to assist Leo.'

"So also does this court sympathize with the Spencers. However, we must find this objection to be without merit, as the Spencers will be able to recover just compensation as determined by the court when the issue arises at hearing or trial."

The issue as raised by the Preliminary Objection was preserved by appeal to the Commonwealth Court. In their Brief in the Commonwealth Court (pp. 41-46), appellants further argued the issue of displacement without provision of relocation assistance, specifically citing the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, §§210, 205(a), 205(c)(4), 205(c)(3), and 24 C.F.R. 42. 10.

The Commonwealth Court did not discuss the issue of whether failure to provide relocation assistance can halt the displacement of the condemnees or

void the take. The Court did refer to its recent decision in Moyer Eminent Domain Appeal, _____ Pa. Commonwealth _____; 349 A.2d 781 (1976). Moyer stated (at 784, 785):

> "The appellants' final preliminary objection is based on asserted, but not adequately described, violations of Federal law and regulations. The law referred to is the Urban Housing Act of 1949, just cited. We have reviewed that enactment and find nothing in it which suggests that a failure to comply with it or regulations adopted pursuant to it would have any effect on the power, under State law, to condemn real estate."

Appellants continued to maintain the violation of these federal laws by appellee's failure to provide relocation assistance in their Petition for Allowance of Appeal to the Supreme Court of Pennsylvania (Petition pp. 14-16). The Supreme Court of Pennsylvania denied the petition by the order of July 27, 1976, appealed from here, thereby sustaining the decisions below.

VI. Federal Questions Substantial

A. §1-602 as violative of just compensation and equal protection guarantees

1. Argument and Holdings Below:

In asserting that 26 P.S. §1-602 violated the constitutional guarantees of just compensation and equal protection of the laws, appellants contended: (1) that the purpose of the legislature in enacting subsections (c) and (d) was to provide flood victims recovery for their flood losses; (2) that standing by itself subsection (c) operated to provide such recovery for those who spent no money on post-flood improvements by treating the property as if no flood damage had occurred, but, by ignoring such flood damage (and the money spent to repair it), provided no such recovery for those, like appellants, who had made post-flood improvements and whose property was then taken at its current market value; (3) that in order to avoid such inequity subsection (d) had to be construed as prohibiting the take of post-flood improved property or requiring reconveyance of it to the owner with compensation for his flood loss; (4) that otherwise those who had spent money to repair flood damage could only be made whole if they received both the fair market value provided by subsection (a) and flood loss compensation for the unimproved portion of their property under subsection (d).

The trial court construed §1-602(d) as not prohibiting the take of post-flood improvements and held that subsection (a) above, under which appellants would receive only the fair market

value of their post-flood improved property, would provide them just compensation. The court ignored the basic point of appellants that §1-602 was unconstitutional unless construed and applied so as to give appellants both post-flood market value and compensation for flood losses.

The Commonwealth Court agreed that subsections (c) and (d) reflected an "obvious intent of the legislature to afford to flood victims a recovery of the flood damages suffered by their property if it is taken for a flood prevention program or other public project...." The Commonwealth Court did not specifically comment on the question of whether subsection (d) prohibited the take or required the reconveyance of post-flood improvements. It, too, however, held, despite its acknowledgment of the legislative purpose to provide compensation for flood losses, that appellants would receive complete just compensation, as constitutionally guaranteed to them, by receiving only the post-flood fair market value provided under subsection (a). The Commonwealth Court further held that there was no denial of equal protection where appellants and others similarly situated would receive only post-flood fair market value (including compensation for expenditures on post-flood improvements), while others who had made no such expenditures on improvements would receive the full pre-flood fair market value for their properties.

Thus, as construed by the Pennsylvania courts, §602 does provide for flood damage compensation to condemnees who made no post-flood improvements, but does not provide such compensation to those who did make such improvements, leaving the latter to compensation consisting only of the post-flood value of their properties--a value which they created by expending their own money on repairs.

2. Operation of §1-602

The goal of subsections (c) and (d), to compensate flood victims for their flood loss, is laudable and works well when no post-flood improvements are made. But under subsection (c), when the owner has rehabilitated his property the result is a financial disaster:

> Assume two identical properties have pre-flood values of $30,000 and post-flood damaged values of $10,000. One owner makes no repairs to his flood-damaged property and waits for condemnation. He is awarded pre-flood value of $30,000 which he puts in his pocket. However, the other property owner is very industrious and decides to help himself while the Federal government, state government, county, city and Redevelopment Authority bicker for years over what to do about urban renewal. This hardworking individual borrows $20,000 which he

> spends to return the property to pre-flood condition and value. His property is then taken by condemnation. Pre-flood and post-flood values are $30,000. He is awarded $30,000. $20,000 is paid to the mortgagee and $10,000 is the net paid to the property owner. The self-reliant individual ends up with $20,000 less than his neighbor who did nothing to help himself. Under the Pennsylvania court's holdings, subsection (d) does nothing to change or ameliorate this result.[1/]

3. Denial of Just Compensation

The Commonwealth Court held (Opinion, p. 4):

> "The provisions of Section 602(c) do not in any manner diminish or

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[1/] Since the flood, condemnees borrowed and expended $131,000 to repair their flood-damaged property (Tr. 381a-382a). If they were to settle for the $125,000 estimated "just" compensation, they would end up with no property, no money in their pocket and $6,000 in debt! No wonder they contend they cannot afford to be "saved" by the government.

impair appellants' entitlement to just compensation as constitutionally guaranteed to them...the measure of damages for the taking being the fair market value of their property immediately before the condemnation and as unaffected by it....That other property owners in the project may receive something more by way of compensation for the taking of their property does not, directly or indirectly, impair appellants' constitutional (fundamental) right to just compensation."

The Commonwealth Court acknowledged, however, that subsections (c) and (d) were added to §602 specifically in order to provide flood victims compensation for the flood damages they had suffered. Thus, recovery of flood losses, as well as recovery of post-flood market value, became through these enactments an element of just compensation. Indeed, subsection (a) provides not only that just compensation shall consist of the fair market value of the property taken, but also of "such other damages as are provided in this Code." Having conferred the benefit of compensation for flood losses on the floods' victims through enactment of subsections (c) and (d), the legislature has made recovery for these losses a part of appellants' constitutional right to just compensation. Nor can such compensation be withheld from them on the grounds that it is a mere privilege: see Shapiro v. Thompson,

394 U.S. 618 (196); Graham v. Richardson, 403 U.S. 365 (1971). It is the operation of §1-602, as construed by the Commonwealth Court, that diminishes and impairs the right of appellants to the full just compensation the legislature sought to provide. It is incomprehensible how the arithmetic result facing the appellants (i.e., $131,000 borrowed for flood repairs and the taking of the fee for $125,000) could be "just compensation." If appellants had not repaired their property, they could have received $125,000 in condemnation, have no debts to repay and would have $125,000 in their pockets instead of no property, no money, and $6,000 in debts.

4. Denial of Equal Protection

Appellants do not claim that the Legislature intended to discriminate against flood victims who had made post-flood improvements. However, in establishing a violation of equal protection it is not necessary to prove intent, motive or purpose to discriminate on the part of public officials. Hawkins v. Town of Shaw, Mississippi, 461 F.2d 1171, 1172 (5th Cir. 1972). A statute, through non-discriminatory on its face, may nevertheless be in violation of equal protection where its effect is to discriminate between persons in the same class. Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064 (1886).

In concluding that the statute does not violate the equal protection clause, the Commonwealth Court stated (Opinion, p. 4):

> "Nor do we find in this legislation a want of equal protection to appellants disassociated from their fundamental right to just compensation which itself is unimpaired. In this category there cannot be and the constitution does not require equal protection of law to all persons under all circumstances. The state action here taken...evidences a rational and socially desirable objective of financial aid for rehousing and relocation of flood victims...."

The language of §602(c) and (d) makes clear that the class intended to be affected by and benefit from the statutes is the owners of property which was damaged by flood and was then taken by eminent domain. The objective of the statutes is to "make up" the flood loss of all victims when their property is taken. The statutes do not intend to help only those who failed to help themselves (by property rehabilitation) and to penalize those who did repair their flood-damaged property.

> "In applying...[the Equal Protection Clause], this Court has consistently recognized that the Fourteenth Amendment

> does not deny to States the power to treat different classes of persons in different ways.... The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' Royster Guano Co. v. Virginia, 253 U.S. 412, 40 S.Ct. 560, 561, 64 L.Ed. 989 (1920)." Reed v. Reed, 404 U.S. 71, 75-76, 92 S.Ct. 251, 253-254 (1971); see Graham v. Richardson, supra; Hanson v. Unified Sch. Dist. No. 500, Wyandotte Cty., Kan. 364 F.Supp. 330 (D. Kansas, 1973); Walters v. Edwards, 396 F.Supp. 808 (E.D. La., 1975)

The object of the legislation (i.e., helping all flood victims who have their property condemned) is not carried out by the subdivision of the class into those who did not repair (and are helped by §602(c)) and those who did repair (and are hurt by §602(c)). No rational basis exists for the law aiding some flood victims and denying

help to others. Appellants are denied equal protection in that the classes created by operation of the statute do not reasonably relate to its purpose. Potomac Electric Power Co. v. Fugate, 341 F.Supp. 887 (E.D. Va. 1972), aff'd. 409 U.S. 943, 93 S.Ct. 290 (1972).

Moreover, even if it could be argued that the classification created by the legislation between flood victims who receive compensation for flood loss and those who do not corresponded to some reasonable state purpose, the right involved here is the right to just compensation, a fundamental right specifically guaranteed by the Fifth Amendment. The state interest underlying a classification that impairs a fundamental right must be a compelling state interest in order to avoid violation of equal protection. Shapiro v. Thompson, supra; Graham v. Richardson, supra. Certainly there can be no compelling state interest in discriminating against flood victims who spent money on repairs or favoring those who did not.

B. §1-601A(b)(3), Business Dislocation Compensation Limit Violative of Just Compensation Guarantee

1. Argument and Holdings Below

Appellants contended at trial and on appeal to the Commonwealth Court and Supreme Court of Pennsylvania

that their junk yard business cannot be relocated, that any relocation would entail a substantial loss of existing patronage, that their business dislocation losses would exceed the $10,000 allowed under §601A(b)(3) of the Eminent Domain Code, that no other provision of law will recompense for dislocation losses, and that, therefore, the statutory limitation on such losses denies just compensation and is violative of the Fifth Amendment of the United States Constitution.

The trial court held that this claim should be deferred for consideration by the Board of View or at trial. The Commonwealth Court agreed that the issue was not properly raised by preliminary objection to the Declaration of Taking, concluding that it was "essentially one of damages" (Commonwealth Court Decision, p. 2). However, the Commonwealth went on to hold that neither an inability to relocate one's business nor the cost of a relocation "enlarge one's constitutional entitlement to just compensation." The court stated further:

> "That the legislature has seen fit to provide for such payments subject to the expressed conditions and limitations found in section 601A(b)(3) does not enlarge one's constitutional right to just compensation for property taken." (Opinion, pp. 2-3).

2. Denial of Just Compensation

The United States Constitution, Fifth and Fourteenth Amendments, require that a condemnee be given just compensation for the taking of his property. Appellants agree that nothing can enlarge their constitutional entitlement to just compensation. Similarly, nothing can diminish or abridge it.

It is appellants' position that the enactment of §601A(b)(3) of the Eminent Domain Code, which provides for compensation for business dislocation losses up to a limit of $10,000, while not changing their entitlement to just compensation, does enlarge the legal definition of just compensation by specifically including business dislocation losses as a compensable item. Having conferred on condemnees the benefit of compensation for business losses, the legislature cannot by arbitrary limit, provide that compensation for $10,000.00 in business losses is just while compensation for over $10,000.00 is more than just and thus not required. Nor can this artificial restriction on just compensation be justified on the grounds that compensation for business losses was not an inherent element of constitutionally mandated just compensation and is thus merely a privilege rather than a right. As stated in Graham v. Richardson, supra, at 374, "...this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'"

The effect of the dollar limit on business dislocation losses is as though an arbitrary limit were set on the term "just compensation." The following hypothetical amendment of §601 of the Eminent Domain Code is illustrative:

> "The condemnee shall be entitled to just compensation for the taking injury or destruction of his property, determined as set forth in this article, provided, however, that damages awarded to condemnee shall not be more than ten thousand dollars."

Those whose damage fell within the limit would receive just compensation and those whose damage exceeded the limit would not. Since, however, just compensation is mandated by the United States Constitution, the failure to provide just compensation to the latter group would be impermissible and their property could not be taken.

So it is with respect to §601A(b)(3). Having included business dislocation losses as an element of just compensation, the legislature cannot give it in full to some and only in part to others. The United States Supreme Court said in Armstrong v. U.S., 364 U.S. 46, 49, 80 S.Ct. 1563, 1569 (1960):

> "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to

bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

That an abridgement of the right to just compensation results from the arbitrary limit on business dislocation losses is made more harshly evident when considered in light of appellants' inability to relocate at all. Appellants presented undisputed testimony at trial that relocation of their business was impossible (Tr. 1029a, 385.1a, 386a-387a, 373a-382a, 393a-395a, 405a-406a). Ten thousand dollars for the total destruction of a business worth vastly more is not just compensation for the loss sustained. In imposing that dollar limit, §601A(b)(3) violates appellant's right to just compensation under the Fifth Amendment.

C. 26 P.S. §1-407(a), Lack of Requirement for Relocation Assistance Repugnant to Federal Law

Section 407(a) of the Pennsylvania Eminent Domain Code permits a condemnor to take possession of condemned property without any requirement that the condemnee be provided relocation assistance. Appellants contended that the appellee's efforts to force their immediate dislocation (through the filing of a notice to quit the premises pursuant to §1-407(a)) without taking any steps whatsoever to provide appellants relocation assistance was in contravention of §210 of the Uniform Relocation Assistance And Real Property Acquisition Policies Act of 1970; 42 U.S.C. §4630.

The trial court interpreted this federal law to require relocation assistance only after the appellee acquired title to the property, despite the fact that it had filed a notice to quit. The Commonwealth Court did not discuss the issue other than by reference to its decision in Moyer Eminent Domain Appeal, _____ Commonwealth Ct. _____; 349 A.2d 781 (1976), which held that no failure to comply with the Urban Housing Act of 1949 would have any effect on a condemnor's power to condemn under state law.

Since the urban renewal project of which appellants' property is a part is 75% funded by HUD, however, the appellee must comply with the requirements of 42 U.S.C. §4630 by providing relocation assistance prior to taking possession of the property. See Jones v. District of Columbia Redevelopment Land Agency, 499 F.2d 502 (D.C. Cir. 1974); Latham v. Volpe, 455 F.2d 1111 (9th Cir. 1971). Its failure to do so and 26 P.S. 407(a), which permits it to take possession without so doing, are repugnant to 42 U.S.C. 4630.

D. Necessity for Review

Hurricane Agnes was one of the worst natural disasters to strike this

country, leaving a trail of destruction amounting to some 3.5 billion in property damage and wreaking unparalleled damage along Pennsylvania's Susquehanna River Valley. Out of this devastation grew the enactment of sections 602(c) and (d) of the Pennsylvania Eminent Domain Code, governing public acquisition of flood damaged properties, designed to provide relief to Agnes' victims. The other direct outgrowth of the disaster which immediately affects appellants was the 75% federally funded flood control urban renewal project of which their property is a part.

The statutes were born of a responsible and compassionate governmental intent and the project was undertaken to further the general public good and the well-being of the project area's residents. Unfortunately for appellants, during the 14 months between the onslaught of Agnes and the final approval of the project, in a state of uncertainty as to what, if anything, their governments might do to remedy their plight, appellants and other residents of Lower Broadway strained to restore their homes and businesses, spending from their pockets and incurring debts so that life might go forward again. And what is the result of their efforts? Their property taken from them at a value which does not even equal the monies spent to restore it while others, who differ from them only in that they made no repairs, receive compensation for all that they lost at the hands of Agnes. The effect of §602

involves not only sppeallants and the residents of Lower Broadway, but great numbers of Pennsylvanians who fell victim to the disastrous flood of 1972. However fine the intent behind them, the statutes that create such inequity violate appeallants' rights to just compensation and equal protection and demand review on those grounds.

Section 601A(b)(3) of the Eminent Domain Code is not a flood related enactment. Forced as a result of the flood and the ensuing redevelopment project, however, to leave their property, appellants are now being effectively destroyed by the $10,000.00 limitation of §601A(b)(3) on compensation for business dislocation damages. Despite thorough searching, appellants have been unable to find any relocation sites for their business in the entire greater Wilkes-Barre area. Appellants' real estate expert testified that a relocation site did not exist (Tr. 395a, 405a-406a). Thus, the taking of appellants' property for this flood control project is literally driving them out of business. Appellant Spencer is in his fifties, has only an eighth grade education, and knows no other line of work.

Appellants surely are not unique: owners of an unaesthetic business which requires specific and unusual physical characteristics for its operation, they are faced with a shrinking availability of land and with a vast expansion of zoning and land use regula-

tions which make the relocation of a business difficult, expensive and, in this case, impossible. The hoary concept that just compensation consists only of compensation for the real property taken has no place amidst today's economic realities. A going business is property every bit as much as is a plot of ground. The Pennsylvania legislature recognized this truth in making business dislocation losses a part of its statutory definition of just compensation. Its attempt to limit this element of just compensation through the $10,000.00 limit of §601A(b)(3) is a void restriction on appellants' constitutional right and requires this Court's consideration.

Finally, the appellee's failure to comply with federal law in a project which is 75% funded by the federal government by failing to provide appellants any relocation assistance is not merely a theoretical wrong. As indicated above, appellants have been unable to find a site on which they can relocate. In this context of real and immediate need for such assistance, the dereliction or willful refusal of the appellee to comply with federal law, and the statute which permit it to gain possession without providing the required assistance, necessitate review by this Court.

APPENDIX A

IN THE COURT OF COMMON PLEAS
OF LUZERNE COUNTY

CIVIL ACTION - LAW

EMINENT DOMAIN

No. 272 of 1974

BEFORE: Bigelow and Hourigan, JJ.

REDEVELOPMENT AUTHORITY
OF THE CITY OF NANTICOKE,

Condemnor,

v.

THEODORE G. SPENCER,
ANNA A. SPENCER, his wife, and
THEODORE G. SPENCER,
Trading and Doing Business as
TED SPENCER & SONS AUTO SERVICE CENTER,

Condemnees.

DECISION

This case is before the court on preliminary objections of condemnees to the declaration of taking, which preliminary objections challenge the power and the right of condemnor to appropriate the condemned property, the sufficiency of security, and the procedures followed by the condemnor.

In their preliminary objections, challenging the power and the right of the condemnor to appropriate their property, condemnees allege the following:

A. That the taking is in violation of their constitutional rights in that they will not be able to obtain just compensation for their property, since their loss of patronage and business income will exceed the maximum allowed by statute for business dislocation damages, and because of the nature of their business they will be unable to relocate.

B. That the determination of the Redevelopment Authority to take all properties in the project on a total clearance basis is arbitrary, capricious, made in bad faith, discriminatory, and based on erroneous facts concerning a flood hazard in the project area.

C. The Secretary of Community Affairs usurped the right of City Council to approve or disapprove the project under the Urban Renewal Law, and the decision of the Secretary was arbitrary, capricious, discriminatory, and based on factual errors as to the flood hazard.

D. That Section 602(d) of the Eminent Domain Code, as amended, prohibits the acquisition of post-flood improvements.

E. Section 602 denies condemnees equal protection of the law and just

compensation in that they are not properly reimbursed for post-flood improvements as opposed to a property owner who made no improvements and is given pre-flood value.

F. The determination by the Redevelopment Authority that the area is blighted is arbitrary and capricious, made in bad faith, and based on outdated and inaccurate factual information.

The challenge to the sufficiency of the security alleges that the open-end bond of condemnor is inadequate and provides no assurance that the Redevelopment Authority will have the necessary funds to make payment for the condemnees' property.

The challenge to the procedures as followed by the condemnor alleges that the filing of the declaration of taking against condemnees is discriminatory and arbitrary in that the Redevelopment Authority has singled out the condemnees for condemnation and served them with a notice to quit the premises because of their opposition to the project, and, further, that the Redevelopment Authority has taken steps to force the immediate dislocation of condemnees, without providing any relocation assistance as required by the Pennsylvania Urban Renewal Law and Federal regulations.

The Redevelopment Authority filed its declaration of taking on January 15, 1974, and at the same time filed a notice

to quit the premises. Thereafter condemnees filed preliminary objections to the declaration of taking.

The condemnees, Theodore G. Spencer and Anna A. Spencer, his wife, who reside on the property, own ten acres of land of which only approximately four and one-half acres have been condemned. The other five and one-half acres will be landlocked. Mr. Spencer operates an automobile junk yard there under the business name of Ted Spencer and Sons Auto Service Center.

Pursuant to the preliminary objections, the parties hereto have taken depositions of various officials of the Redevelopment Authority of the City of Nanticoke, the Planning Commission, Theodore Spencer one of the condemnees, and others whose testimony the parties felt was pertinent to the issues. In addition they introduced into the record numerous exhibits for the consideration of the court.

I.

The Challenge to the Power and Right to Appropriate the Condemnees' Property

A. Condemnees in this reason assert that the taking is in violation of their constitutional rights because of condemnees' inability to relocate the business, the loss of patronage, and the loss of business income will exceed the maximum

permitted by statute for business dislocation damages and therefore they will be denied just compensation for the taking.

In Hegedic v. Department of Transportation, 8 Pa. Commonwealth Ct. 551 (1973), the court affirmed and quoted the opinion of the lower court as follows, at page 556:

> "The condemnee's final preliminary objection is that the Eminent Domain Code is unconstitutional as it excludes consideration of the net profits of a business as an element of damages. That issue is improperly raised by preliminary objection. It would not even become a matter of dispute if the parties agreed upon a settlement figure for the property. If there was no agreement between the parties the issue would properly come before the court when the condemnee attempted to introduce the capitalized value of the net profits of the business as an element of damages at either the Board of Viewers hearing or at trial and it was excluded from consideration."

In view of the above-quoted paragraph it appears that the issue of just compensation must be raised at the Board of View and/or trial of the case

when the court would then act and determine condemnees' claim for just compensation.

B. Condemnees assert that the determination of the Redevelopment Authority to take all properties in the project on a total clearance basis is arbitrary, capricious, made in bad faith, discriminatory, and based on erroneous facts concerning a flood hazard in the project area.

In support of this reason condemnees in their preliminary objections, allege that a substantial portion of the project area is not within the one hundred year flood plain as it is designated on a special flood hazard map by the Federal Insurance Administration, and secondly, that of the seventeen Urban Renewal projects in Luzerne County, only the instant project is on total clearance rather than spot clearance.

Upon appeal, it is presumed that the Redevelopment Authority performed its duties in good faith and the condemnees' burden of proving fraud or abuse of discretion is a heavy one. Pittsburgh School District Condemnation Case, 430 Pa. 566 (1968); Simco Stores v. Redevelopment Authority, 455 Pa. 438 (1974).

Condemnees rely on a map of the City of Nanticoke by the Department of Housing and Urban Development, Federal Insurance Administration, dated August 24, 1973 (Condemnees' Exhibit #7) which

does not include the entire project area in the special flood hazard zone as evidence that the project area is not in the one hundred year flood plain.

However, the Federal Insurance Administration issued a new map on December 14, 1973 (Condemnees' Exhibit No. 8) which does include the entire project area in the flood hazard zone.

In his depositions, Eugene Walsh, Executive Director of the Redevelopment Authority, stated that when the Redevelopment Authority received the August 1973 map, the Redevelopment Authority wrote to the Federal Insurance Administration for clarification of the flood hazard in Nanticoke because the hazard area as shown on the map conflicted with the data received from the Corps of Engineers and the Department of Community Affairs and the Redevelopment Authority's understanding of hazard area. Thereafter the Federal Insurance Administration issued the map of December 14, 1973, which included the entire project area in the flood hazard zone, and accurately depicted the flood hazard in accordance with data of the Corps of Engineers (Depositions - Walsh, pp. 55-60).

In view of the depositions of Mr. Walsh, this court must find that the map of December 14, 1973 properly locates the flood hazard zone and that the entire project area is within the one hundred year unprotected flood plain.

The mere fact that other communities in Luzerne County have spot clearance projects rather than total clearance, does not show that the Redevelopment Authority decision for total clearance was an abuse of discretion or arbitrary.

Haddington L. Org., Inc., et al. v. Sherman, 8 Commonwealth Ct. 309, 315 (1973) states:

> "We recognize that judicial interference with an urban redevelopment authority's performance of its discretionary duties can only be sustained where it is clearly shown that the authority acted outside the scope of its statutory authority or in the improper exercise of its discretion. See Landerman v. Churchhill Area School District, 414 Pa. 530, 200 A. 2d 867 (1964); Redevelopment Authority of the City of Erie v. Owners or Parties in Interest, 1 Pa. Commonwealth Ct. 378, 274 A. 2d 244 (1971). We accept the standard of judicial review pronounced in Blumenschein v. Pittsburgh Housing Authority, supra, that 'courts will not review the actions of governmental bodies or administrative tribunals involving acts of discretion, in the absence of bad faith, fraud, capricious action or abuse of power; they will

> not inquire into the wisdom of such actions or into the details of the manner adopted to carry them into execution. It is true that the mere possession of discretionary power by an administrative body does not make it wholly immune from judicial review, but the scope of that review is limited to the determination of whether there has been a manifest and flagrant abuse of discretion or a purely arbitrary execution of the agency's duties or functions. That the court might have a different opinion or judgment in regard to the action of the agency is not a sufficient ground for interference; judicial discretion may not be substituted for administrative discretion.' 379 Pa. at 573, 109 A.2d at 335."

Eugene Walsh testified to the numerous factors considered in the Redevelopment Authority's recommendation of total clearance as opposed to spot clearance. The first consideration was that the area was in the unprotected, one hundred year flood plain, and secondly that the Corps of Engineers had indicated that there were no plans to extend the dike system. The position of the state officials as to whether the project qualifies as flood control and therefore pre-flood value could be paid to residents, was also considered. The Department of Community Affairs had

taken a position that this must be a total clearance project to qualify as a flood control project, to receive State funding and to be able to pay pre-flood values. (Depositions - Walsh 30-32).

Further, the Authority considered the effect that less than total clearance would have on the existing neighborhood, and the City's responsibility to that neighborhood in the future. The Authority also considered the environmental conditions which could result from a continuing deteriorating neighborhood (Depositions - Walsh - 35-36).

The factors considered and conclusions reached were summarized in a letter dated March 23, 1973, from Walsh to Mayor E. Edward Gorka (Redevelopment Exhibit No. 5). In summary, it stated at pages 6, 7:

> "I believe that you can see that we have agonized as you have over this matter. We have resorted to extraordinary techniques in getting information since there is little if any written help for us to make our decision, yet we face the June 30 deadline for execution of Loan and Grant Contract. On the other hand, I think you can see why we arrived at our total clearance concept as it would allow us to assemble the greatest number

> of tools in history, in a coordinated way to prevent as many people as possible from being hurt. We have extraordinary powers and <u>can</u> find the way to do this if only we are given the opportunity to do so. We do not make this claim lightly and we realize fully the difficulty which we are more or less requesting to undertake. It would be a more expeditious but very short-sighted view to recommend another course, but in the long run easy decisions now will cause long term difficulties later."

The decision to recommend total clearance was within the scope of discretionary authority of the Redevelopment Authority, and the letter and depositions above clearly indicate that the Authority reached its decision on the basis of what in its judgment was best.

> "Discretion involves the exercise of judgment incidental to the proper performance of the duty delegated. When the contention is that the proposed action is unwise, no matter by what consensus of opinion this is shown, the law will refer it to mistaken judgment over which it has no supervision.

Robb et al. v. Stone et al., 296 Pa. 482, 492 (1929)

In view of the above, we cannot find manifest abuse of discretion or arbitrary action in the decision to adopt total clearance.

C. Condemnees assert that the Secretary of Community Affairs usurped the right of City Council to approve or disapprove the project under the Urban Renewal Laws, and the decision of the Secretary was arbitrary, capricious, discriminatory and based on factual errors as to the flood hazard.

The Department of Community Affairs had a policy that it would not approve of state participation in an urban renewal project in the one hundred year unprotected flood plain unless the project was a total clearance. The Department would not waive this policy for Nanticoke although it did permit less than total clearance in other communities (Walsh - Depositions - 17, 32).

Condemnees have presented no evidence showing upon what information or basis the Department of Community Affairs made its decision, although they allege it was based on factual errors as to flood hazard and that it was arbitrary, capricious and discriminatory.

> "In the absence of proof to the contrary, the law presumes that

> a public official acted pursuant to proper authority and that he properly performed every duty and met every requirement necessary or essential to the validity of his official act."

Nixon Hotel, Inc. v. Red. Auth. of Butler, 11 Commonwealth Ct. 519, 528 (1974)

The Housing and Redevelopment Act, Act of May 20, 1949, P. L. 1663, as amended provides that public funds may be provided by the State in the form of grants upon application, subject to the review of the Department of Community Affairs, to remedy conditions "set forth in the Urban Redevelopment Law and for carrying out comprehensive programs for the development of entire sections or neighborhoods by making grants to municipalities or redevelopment authorities." See 35 P.S. §1662. The Act further gives the department authority to enact rules and regulations in furtherance of the purposes of the Act (35 P.S. §1668).

The standard for judicial review has been set forth as follows:

> "Only a flagrant abuse of such powers on the part of administrative officials in matters entrusted to them by law would move the judicial branch of the government to restrain its exercise. As the Supreme Court

of California said in Veterans' Welfare Board v. Jordan, Secretary of State, 208 Pac. 284 at 292, 'Questions of policy are not submitted to judicial determination, and the courts have no general authority of supervision over the exercise of discretion which under our system is reposed in the people or other departments of government. Chicago, Burlington & Quincy R.R. Co. v. McGuire, 219 U.S. 549, 569; German Alliance Insurance Co. v. Lewis, 233 U.S. 389.'"

Hayes v. Scranton et al., 354 Pa. 477, 482, 483 (1946)

Therefore, in the absence of any evidence showing upon what basis the Department made its decision or that the Department's ruling was improper, it is presumed the Department properly performed its statutory duty in issuing the ruling on policy requiring total clearance as a condition of State participation of funding for Nanticoke, and designation of the project as flood control for payment of pre-flood values. We note that after the Secretary's ruling, the Act of September 27, 1973, No. 71, Section 1, amended the Eminent Domain Code by providing for payment of pre-flood values for all flood damaged properties, not just property taken for flood control projects.

The Urban Redevelopment Law, in Section 10 (35 P.S. §1710(h)) states:

> "The governing body shall approve or reject the redevelopment proposal as submitted."

The council had full power to either approve or disapprove the proposal as submitted to it by the Redevelopment Authority. The above provision does not appear to give the Council authority to alter or amend the proposal and in particular to change it from total clearance to partial, and there is nothing in the record to support condemnees' assertion that the Secretary of Community Affairs influenced City Council's approval.

D. Condemnees assert that Section 602(d) of the Eminent Domain Code, as amended, prohibits the acquisition of post-flood improvements.

Section 602(d) of the Eminent Domain Code states:

> "In the case of property which was damaged by the floods of September, 1971 and June, 1972, an acquiring agency may acquire the entire property interest of a condemnee, except any improvements made since the date of the floods, and reconvey to the condemnee a portion of the property interest taken; in which case the damage shall be the difference between the value of

the property interest acquired, excluding flood damage, and the value of the property interest reconveyed. For the purposes of this act, all mobile homes which were in use as dwellings and were destroyed, demolished or damaged beyond reasonable repair by the natural disasters of September 1971 and June 1972 shall be considered to be real property."

Condemnees' assertion that Section (d) prohibits the acquisition of post-flood improvements appears contrary to clear language of the Section (d) providing that the agency may "acquire" and "reconvey."

In the Department of Community Affairs Bulletin of March 1974, Robert J. Barr, Chief of the Development Division of Department of Community Affairs' Bureau of Housing and Development, wrote an article on the Pennsylvania Eminent Domain Code and in discussing Section (d), stated at page 11:

> "It must be emphasized that this power is discretionary in order to allow acquiring agencies to correct what otherwise might be gross inequities. Acquiring agencies are not obliged to acquire any property under this provision of the law."

The court agrees with Mr. Barr.

E. This objection alleges that Section 602 of the Eminent Domain Code denies condemnees equal protection of the laws in that they are not properly reimbursed for post flood improvements as applied to a property owner who makes no improvements and gets pre-flood value.

This objection is without merit. Section 602(a) of the Eminent Domain Code (26 P.S. 1-602) provides:

> "Just compensation shall consist of the difference between the fair market value of the condemnee's entire property interest immediately before the condemnation and as unaffected thereby and the fair market value of his property interest remaining immediately after such condemnation and as affected thereby...."

The above section provides that condemnees will receive the fair market value as determined on the date of the condemnation which value would include post flood improvements.

F. The next objection of condemnees is the determination that the area is blighted is arbitrary, capricious, made in bad faith, and based on outdated and inaccurate factual information.

The conditions which are to be considered in the determination that an

area is blighted are set forth in the Urban Redevelopment Law, Section 2(a) 35 P.S. 1702), which states:

> "(a) That there exist in urban communities in this Commonwealth areas which have become blighted because of the unsafe, unsanitary, inadequate or overcrowded condition of the dwellings therein, or because of inadequate planning of the area, or excessive land coverage by the buildings thereon, or the lack of proper light and air and open space, or because of the defective design and arrangement of the buildings thereon, or faulty street or lot layout, or economically or socially undesirable land uses."

In order to determine the area is blighted it is not necessary that each and every condition specified in the above statute exist but any one of the conditions is sufficient to warrant a certification that the area is blighted. Oliver v. Clairton, 374 Pa. 333 (1953).

The Redevelopment Authority in preparation of its case had the area re-evaluated by its consultant firm in April 1974.

At that time the Redevelopment Authority had acquired approximately thirty of the properties, which were mainly the properties of persons who did

not make post flood improvements.

The survey states there are seventy-seven physical structures in the area, seventy-one of the structures represented either substandard building conditions or deficiencies warranting clearance to remove a blighting influence. (Suddleson, p. 97; Condemnee's Exhibit No. 6, p. 24). Further, the planning on the area was inadequate, there was poor road layout, inadequate access to area, the structures are close together, there is a high density of building and lack of sufficient yard area (Suddleson, p. 100 Condemnees' Exhibit No. 6, p. 1-20). The area has inadequate curbing, absence of sidewalks throughout most of the area and streets are narrow (Kavulich 161, Condemnees' Exhibit No. 6, p. 13-16, and Exhibit D - Photographs).

It appears, therefore, that the conditions which existed in April 1974 would support a finding that the area is presently blighted although some properties in the area have been improved since the original determination of blight was made. Many of the deficiencies are permanent without total clearance because of inadequate planning - narrow streets, overcrowded buildings, absence of adequate sidewalks and curbing are not affected by post flood improvements. Further, the failure of many of the property owners to improve their properties would cause a continuing blighting influence on the area.

We therefore conclude that blight presently exists in the area and the allegation of condemnees that the determination is based on outdated, inaccurate factual information is without merit.

Condemnees in their brief allege that the determination or certification of the Planning Commission was arbitrary, capricious and made in bad faith although in their preliminary objections make no reference to the Planning Commission or its determination.

Condemnees have taken the depositions of the Planning Commission, and from those depositions they allege that the Planning Commission did not have sufficient understanding of the legal meaning of the word "blight", and they did not sufficiently consider the Resolution prior to passage. The scope of judicial review has been previously set forth in this opinion. Condemnees' burden is a heavy one. The resolution certifying the area as blighted was delivered to the Planning Commission by the Redevelopment Authority on October 31, 1972. On the following night, November 1, 1972, the Planning Commission adopted the Resolution as presented. Present at the meeting of the Planning Commission was Mr. Buttrick, Assistant Director of Relocation and Property Management of the Redevelopment Authority. Each of the individual memebers of the Planning Commission, on deposition, stated that at the November 1, 1972 meeting, when

the Resolution was presented, that seven particular findings of blight were discussed individually (See depositions of Planning Commission, Dalmas, page 7, Shipkowski p. 32, Sowa p. 41, Swigonski p. 50, Hudak pages 57, 58), although none of them was able to recall the specific questions and specific statements made at the meeting. In addition, each member of the Planning Commission stated that they are completely familiar with the area and were aware of the extent of the flood damage.

Two of the members of the Planning Commission at the meeting voted against the Resolution because they felt they had not sufficient time to review the survey and planning application for the Lower Broadway Renewal Area.

Further, the minutes (Condemnees' Exhibit No. 16) show in a handwritten note that at the next submission of the plan the commission will look at the plan critically. The next meeting was on April 4, 1973, and it appears from the depositions of Frank Dalmas, pages 18, 19, that the Planning Commission members had adequate time before the meeting to review the plan.

In Oliver et al. v. Clairton, 374 Pa. 333 (1953) at pp. 337-338, the court stated:

> "Coming now to the appellant's complaints that there were irregularities in the redevel-

opment proceedings we regard them, as did the court below, as wholly captious and without any substantial merit. The Urban Redevelopment Law (Act of May 24, 1945, P.L. 991) provides, section 10, that the Authority shall prepare a redevelopment proposal for any area certified by the Planning Commission, and for which the latter has made a redevelopment area plan, which plan shall include certain prescribed data. Appellant finds fault with the fact that in the present case the initiative was apparently taken by the Authority itself, for it prepared and adopted a redevelopment proposal and submitted it to the Planning Commission for review before the latter body had certified the area as blighted. However, the Planning Commission, having carefully studied the entire project, did thereupon certify the area as blighted and at the same meeting examined and approved the redevelopment proposal. The order in which these transactions occurred is obviously of no real importance; the certification required by the law being made by the Planning Commission after full consideration, and the redevelopment proposal being adopted by the Authority and approved by the

> Planning Commission, this was all that the law substantially required."

It appears, therefore, under the above-cited case that the order of the transactions are not important and the fact that, as in this case, that at the April 4, 1973 meeting, the Planning Commission had fully considered the certification and the redevelopment proposal, and that is all that is required. We cannot find that the actions of the Planning Commission show a manifest and flagrant abuse of discretion or a purely arbitrary execution of the agency's duties or functions.

Further, condemnees allege that the Planning Commission approved blight without specifying the type of blight. In Oliver v. Clairton, supra, page 338, the court said of a similar objection:

> "Appellant complains that the Planning Commission failed to prepare the redevelopment area plan containing all of the information specified in the statute. Since, however, it did approve the redevelopment proposal, and since that proposal complied strictly with the requirements of the act in regard to a redevelopment area plan, this technical variation did not constitue an irregularity worthy of serious consideration."

The Planning Commission in approving parts 1 and 2 of the application to HUD, determined that the blight that existed required total clearance.

II.

Challenge to the
Sufficiency of the Security

Condemnees have challenged in this reason that the open end bond of condemnors is inadequate and provides no assurance that the Redevelopment Authority will have the necessary funds to make payment for condemnees' property.

> "The second issue presented for our resolution is whether the bond filed by the Authority complies with the requirements of Article I, §10 of the Pennsylvania Constitution that private property shall not be taken without just compensation being first made or secured. The lower court held that the Authority's bond was insufficient to meet the constitutional mandate. We agree.
>
> "The filing of a naked bond without providing some sort of security for the bond does not fulfill the requirement that just compensation must be paid or secured at the time of taking. While we agree with the lower

> court's determination as to the inadequacy of the bond, we must nonetheless remand to the lower court for the purpose of permitting the Authority to file a bond which in the opinion of the lower court will be proper and adequate. Eminent Domain Code, Act of June 22, 1964, P.L. 84, §403(c), 26 P.S. §1-403(c). Cf. Pittsburgh Railways Co. v. Port of Allegheny County Authority, 415 Pa. 177, 202 A. 2d 816 (1964)."

Municipal Authority of Zelienople Boro. Appeal, 431 Pa. 306, 310, 311 (1968)

There is no evidence in the record from which this court could decide that the bond of the Redevelopment Authority is sufficient.

In Faris Appeal, 435 Pa. 55 (1969), at pages 56, 57, the court stated:

> "The Redevelopment Authority of Altoona condemned appeallants' properties upon which the Authority filed an open-end bond. Appellants filed preliminary objections contending that, since the Authority had no power of taxation and that its financial resources were questionable, the bond filed was of 'insufficient security.' The trial judge dismissed the preliminary

objections without requiring an answer or holding a hearing. In doing so we feel that the lower court abused its discretion since a question of fact was raised by the preliminary objections as to the sufficiency of the security. In order to make a determination on the merits of that contention, an adequate record should have been made. Hence we remand the case for proceedings upon which this determination can be based."

However, rather than require additional depositions and delay proceedings the court directs that the Redevelopment Authority file bond of security in an amount double its estimated value of the property at the time of take.

III.

Challenge to Procedure

A. Condemnees assert the filing of the declaration of taking against them is discriminatory and arbitrary in that the Redevelopment Authority has singled them out for condemnation and served them with a notice to quit the premises because of their opposition to the project.

Prior to the deposition of Eugene Walsh, the parties made a statement to the court which included the following: (Walsh Depositions, i, ii.)

"Also, the parties have agreed to proceed with a single Declaration of Taking in the instant case because there are some thirty families involved with the project who have indicated a wish not to be taken. These numerous properties have common issues of law and fact which will arise in this case. Therefore, both parties wish to have a complete adjudication of this matter before proceeding with the other cases to avoid multiplicity of suits and to minimize costs, inconvenience and expense to all parties. The property selected for the test case Declaratijon of Taking was the Spencer property that is involved herein.

"The parties understand that there are certain other property owners in the project who wish to be acquired and the Redevelopment Authority is proceeding with said acquisition, it being the belief of both sides that the acquisition of these other properties has no effect on the outcome of this case."

It appears that the parties have agreed to proceed with a single Declaration of Taking and agreed on the Spencer property.

Further, Donald E. Smith, Director of Real Estate and Community Development, stated that the notice to quit is always filed with the Declaration of Taking (Smith 132, 133).

In view of the foregoing this court finds no merit in the above objections.

B. The Redevelopment Authority has taken immediate steps to force the immediate dislocation of condemnees, without providing any relocation assistance as required by Urban Renewal Law and regulations.

> "The thrust of the statute and the regulations is that no right to relocation assistance arises until the property is, in fact, acquired by the agency through condemnation or sale or until a contract for purchase of the property is signed. There is no entitlement to relocation benefits or assistance unless and until the property is acquired by the agency. Thus, the argument that the condemnation is unlawful because the relocation provisions were not followed cannot be logically asserted, since condemnation, or sale, is a prerequisite to eligibility for relocation benefits."

Condemnation of 4150-52 E. Thompson St., 64 D. & C. 2d 306, 309, 310 (1973)

We have the same sentiments for the Spencers as was expressed by the Commonwealth Court in Leo Realty Co. v. Redevelopment Authority of Wilkes-Barre, 13 Pa. Commonwealth Ct., 288, 292 (1974):

> "Although we sympathize with Leo concerning the predicament in which it finds itself (the record establishes that there is a scarcity of property which could be used for Leo's purposes in the City of Wilkes-Barre, thereby making relocation difficult or even impossible). We are powerless to assist Leo."

So also does this court sympathize with the Spencers. However, we must find this objection to be without merit, as the Spencers will be able to recover just compensation as determined by the court when the issue arises at hearing or trial.

ACCORDINGLY, we enter the following

ORDER

NOW, this 2nd day of April, 1975, at 11:55 a.m., it is ordered and decreed as follows:

1. Condemnees' preliminary objection to the sufficiency of security is sustained, and it is directed that the Condemnor file a bond of security within twenty (20) days, in double the amount of its estimated value of the property at the time of the take.

2. Condemnees' other preliminary objections are dismissed.

BY THE COURT EN BANC,

/s/ Hourigan
J.

Donald D. McFadden, Esq.
For Condemnor

Philip F. Hudock, Esq.
For Condemnees

APPENDIX B

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

NO. 634 C. D. 1975

REDEVELOPMENT AUTHORITY
OF THE CITY OF NANTICOKE

v.

THEODORE G. SPENCER,
ANNA A. SPENCER, his wife, and
THEODORE G. SPENCER,
trading and doing business as
TED SPENCER & SONS AUTO SERVICE CENTER,

Appellants

Before: Honorable James S. Bowman,
President Judge
Honorable James C. Crumlish,
Jr., Judge
Honorable Glenn E. Mencer,
Judge
Honorable Theodore O. Rogers,
Judge
Honorable Genevieve Blatt,
Judge

Argued: October 8, 1975

OPINION BY PRESIDENT JUDGE BOWMAN

Filed January 23, 1976

In this appeal by property owners, Theodore G. Spencer and wife, they assert the lower court erred as a matter of law in its disposition on the merits of several issues raised by their preliminary objections to the declaration of taking of their property by the Redevelopment Authority of the City of Nanticoke. They also insist it likewise erred in concluding that other issues so raised concerning the measure of damages to be applied in arriving at just compensation were not within the permissible scope of preliminary objections under Section 406 of the Eminent Domain Code, Act of June 22, 1964, Spec. Sess., P. L. 84, as amended, 26 P.S. §1-406.

Having considered the issues raised in this appeal which were decided by the lower court on their merits we affirm its order as to these issues and adopt its opinion in support thereof. The record rebukes appellants' contentions that the taking in question was for a private rather than a public purpose and appellants wholly failed to establish that the governmental authorities acted illegally, arbitrarily or capriciously in planning, certifying and approving the flood project in question. The principles of law applicable to the resolution of such issues have again been reviewed and restated in our recent decision in Moyer Eminent Domain Appeal,

_____ Pa. Commonwealth Ct. _____, 349 A.2d 781 (No. 1526 C. D. 1974 & No. 398 C. D. 1975, filed January 2, 1976).

Considering other issues raised by appellants' preliminary objections dismissed for procedural reasons by the lower court, the record discloses the following background facts. Appellants are the fee owners of 2.526 acres of land in the Lower Broadway area of Nanticoke on which there is operated a junk yard and a new and used auto parts business. This property is within the boundaries of an Urban Renewal Area having been declared a blighted area after devastation by the flood associated with Hurricane Agnes. The plan calls for total clearance of all structures, residential and nonresidential, within the area.[1/]

The first of these issues attacks Section 601-A(b)(3) of the Code, 26 P.S. §1-601A, as unconstitutional and void in limiting business relocation damages

---

[1/] For further background and history of the project which has been the subject of two prior court decisions, see Project Area Committee v. Wilcox, 13 Pa. Commonwealth Ct. 4, 317 A.2d 651 (1974); Lower Broadway Citizens Group v. City of Nanticoke, 63 Luz. L. Reg. 172 (1973).

to a maximum amount of $10,000. Appellants argue that such a limitation permits a taking of property without just compensation. Relying upon our opinion in Hegedic v. Department of Transportation, 8 Pa. Commonwealth Ct. 551, 304 A.2d 181 (1973), the lower court concluded that this issue, being essentially one of damages, was not cognizable by way of preliminary objections to a declaration of taking.

We agree that this issue, framed in constitutional terms or otherwise, was improperly raised under Section 406 of the Code. We would further observe that the inability to relocate one's business taken in condemnation cannot vitiate or negate the power of condemnation otherwise enjoyed by the Authority nor does the cost of such relocation, if relocation is possible, enlarge one's constitutional entitlement to just compensation. See Sgarlat Estate v. Commonwealth, 398 Pa. 406, 158 A.2d 541, cert. denied, 364 U.S. 817 (1960). Appellants' argument is singularly lacking in citation of any authority, Federal or State, that the cost of relocating a business is an element of damages in ascertaining just compensation constitutionally required to be paid under the power of eminent domain. That the legislature has seen fit to provide for such payments subject to the expressed conditions and limitations found in Section 601-A(b)(3) does not enlarge one's constitutional right to just compensation for property taken.

Appellants next attack Section 602 (c) of the Code, 26 P.S. §1-602, as denying to them the equal protection of the law in that these provisions afford to condemnees of property damaged by flood the before-flood value of their property when taken within certain time frames in connection with a flood prevention project or other public programs.

From this obvious intent of the legislature to afford to flood victims a recovery of the flood damages suffered by their property if it is taken for a flood prevention program or other public project, appellants fashion a want of equal protection to them and others who restored their flood damaged properties on the theory that those who did not restore their properties will receive more than the precondemnation value of their property, whereas appellants and others similarly situated will receive only their precondemnation value for the taking. This they contend is a want of equal protection of their fundamental (constitutional) right to just compensation for property taken or, alternately, their equal protection rights are violated for want of rational basis for the state action in favoring those who did not restore their flood damaged properties.

Although somewhat ingenious, these arguments on analysis are not persuasive. The provisions of Section 602(c) do not in any manner diminish or impair appellants' entitlement to just compensation

as constitutionally guaranteed to them and as recognized in Section 601 of the Code, 26 P.S. §1-601, the measure of damages for the taking being the fair market value of their property immediately before the condemnation and as unaffected by it. The appellants are, therefore, assured the fair market value of their property including the post-flood improvements made thereto. That other property owners in the project may receive something more by way of compensation for the taking of their property does not, directly or indirectly, impair appellants' constitutional (fundamental) right to just compensation.

Nor do we find in this legislation a want of equal protection to appellants disassociated from their fundamental right to just compensation which itself is unimpaired. In this category there cannot be and the constitution does not require equal protection of law to all persons under all circumstances. The state action here taken to aid flood victims under the limited conditions and circumstances prescribed as part of a flood project or other public program in which the Federal, State and local governments participate in planning, executing and financing, evidences a rational and socially desirable objective of financial aid for rehousing and relocation of flood victims incident to a public program designed to overcome a future similar disaster. Village of

Belle Terre v. Boraas, 416 U.S. 1 (1974). The order of the lower court is affirmed and the proceedings hereby remanded.

/s/ James S. Bowman
James S. Bowman,
President Judge

APPENDIX C

Supreme Court of Pennsylvania
Eastern District

Sally Mrvos
Prothonotary
Laura E. Litchard
Deputy Prothonotary

Philadelphia 19107

August 5, 1976

Philip F. Hudock, Esquire
408 First Valley Bank Bldg.
Hazleton, Penna. 18201

Re: Redevelopment Authority of the City of Nanticoke v. Theodore G. Spencer, et ux., etc. - No. 2348 Allocatur Docket

Dear Mr. Hudock:

Please be advised that the following Order has been endorsed on the Petition for Allowance of Appeal in the above captioned matter:

"Petition denied this 27th day of July, 1976.

Per Curiam."

Very truly yours,

/s/ Sally Mrvos
Prothonotary

SM/lj
cc: Donald McFadden, Esquire
John G. Swatkoski, Esquire

APPENDIX D

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

NO. 2348 ALLOCATUR DOCKET

REDEVELOPMENT AUTHORITY
OF THE CITY OF NANTICOKE,

Appellee,

v.

THEODORE G. SPENCER,
ANNA A. SPENCER, his wife,
THEODORE G. SPENCER,
Trading and Doing Business as
TED SPENCER & SONS AUTO SERVICE CENTER,

Appellants

NOTICE OF APPEAL
TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given by the appellants, Theodore G. Spencer, Anna A. Spencer, and Theodore G. Spencer, doing business as Ted Spencer & Sons Auto Service Center, of their appeal to the Supreme Court of the United States from the Order of this Court denying appellants' Petition for Allowance of Appeal, entered July 27, 1976.

The appeal to the Supreme Court of the United States is taken pursuant to 28 U.S.C. §1257 and §2101.

/s/ Philip F. Hudock
Philip F. Hudock,
Counsel for Appellants
408 First Valley Bank
Building
Hazleton, Pennsylvania
18201
717-454-3541

Certificate of Service

I certify that I have, this 19th day of October, 1976, in compliance with United States Supreme Court Rule 33(1), served a copy of the foregoing Notice of Appeal by first-class mail on Donald McFadden, Esquire, 85 West Union Street, Wilkes-Barre, Pennsylvania 18702, and John G. Swatkoski, Esquire, 11 West Union Street, Wilkes-Barre, Pennsylvania 18702, counsel of record for Appellee, Redevelopment Authority of the City of Nanticoke.

/s/ Philip F. Hudock
Philip F. Hudock

Supreme Court, U. S.
FILED
NOV 22 1976
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1976
No. 76-579

THEODORE G. SPENCER, et al.,

Appellants

vs.

REDEVELOPMENT AUTHORITY OF THE CITY OF NANTICOKE,

Appellee

MOTION TO DISMISS OR AFFIRM APPEAL FROM STATE COURT FOR WANT OF SUBSTANTIAL FEDERAL QUESTION

Donald D. McFadden, Esquire
Counsel for Appellee
Flanagan, Doran, Biscontini
& Shaffer
85 West Union Street
Wilkes-Barre, Pennsylvania
18702

November 17, 1976

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976
NO. 76-579

THEODORE G. SPENCER, et al.,
Appellants
v.
REDEVELOPMENT AUTHORITY OF THE CITY OF NANTICOKE,
Appellee

MOTION TO DISMISS OR AFFIRM APPEAL FROM STATE COURT FOR WANT OF SUBSTANTIAL FEDERAL QUESTION.

The Appellee moves the Court to dismiss the Appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of the State of Pennsylvania on the ground that it does not present a substantial federal question and that it is manifest that the questions on which the Decision of the case depends are so unsubstantial as not to need further argument.

THE NATURE OF THE CASE.

The Appellant challenges the constitutionality of certain provisions of the Eminent Domain Code of the Commonwealth of Pennsylvania as it has been applied to them in a disaster urban renewal project. The Appellants, however, have not raised a substantial, federal question. Further, it is manifest that the questions on which the Decision of the case depends are so unsubstantial as not to need further argument. The Hurricane Agnes Disaster was a unique phenomenon. (J.S. 41 and 42). As such the issues raised herein are limited in scope and impact.

ARGUMENT

I. DOES SECTION 1-602 OF THE PENNSYLVANIA EMINENT DOMAIN CODE VIOLATE THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES AS APPLIED TO APPELLANTS?

Appellants' properties were damaged in the flood. After the flood, Appellants restored their properties to usable condition. The Redevelopment Authority of the City of Nanticoke filed a Declaration of Taking pursuant to the Eminent Domain Code. The Eminent Domain Code, 26 P.S. §1-602 provides that a condemnee must be paid the fair market value of his property as of the date of taking. Appellants contend that because they are not being compensated for the damage sustained by them in the flood, they are being denied their Fifth Amendment right to just compensation. Appellants' contention on this issue is blatently frivolous. They are being paid just compensation. They have no constitutional right to be paid for their flood losses.

II. DOES SECTION 1-602 OF THE PENNSYLVANIA EMINENT DOMAIN CODE AS IT IS BEING APPLIED TO APPELLANTS DEPRIVE THEM OF THE EQUAL PROTECTION OF THE LAWS?

After the flood and before any Declarations of Taking were filed, some of the flood victims repaired the flood

damage that was done to their properties. The flood victims who did repair their properties received Small Business Administration disaster loans. These loans carry interest at the rate of one (1%) per cent and the first Five Thousand ($5,000) Dollars thereof was forgiven. Whether or not an individual availed himself of the Small Business Administration disaster loans and repaired his property was a purely voluntary act on the part of the individual. The Pennsylvania Eminent Domain Code, 26 P.S. §1-602, provides that the condemnee is entitled to receive the fair market value of his property on the date of taking as unaffected by the flood. This is commonly referred to as pre-flood value by those unsophisticated in the law. It is not really pre-flood value. Rather, it is the fair market value on the date of taking as unaffected by the flood damage. Appellants contend that this denies to them the equal protection of the laws. Appellants fail to appreciate the fact that those individuals who have voluntarily undertaken to avail themselves of the Small Business Administration disaster loans with the one per cent interest and the $5,000 forgiveness and to voluntarily repair their property with those loans, are in a different class or category from those who have not done so. The law is well settled that the Constitution does not require equal protection of law to all persons under all circumstances. Economic and social legislation does not violate equal protection provided the law be reasonable, not arbitrary and bears a rational relationship to a permissible state objective. Village of Belle Terre

v. Boraas, 416 U.S. 1 (1974).

III. DOES SECTION 1-601A (b) (3) CONSTITUTE A DENIAL OF THE FIFTH AMENDMENT RIGHT TO JUST COMPENSATION AS THAT SECTION HAS BEEN APPLIED TO THE APPELLANTS?

The Eminent Domain Code of the Commonwealth of Pennsylvania, 26 P.S. §1-601A (b) (3) provides for payment of an amount not to exceed Ten Thousand ($10,000) Dollars as business dislocation damages. The Appellants contend that they have lost an amount in excess of $10,000 as a result of the dislocation of their business. The cost of relocation does not enlarge one's constitutional entitlement to just compensation. See Sgarlat Estate v. Commonwealth, 398 Pa. 406; 158 A.2d, 541, Cert. denied; 364 U.S. 817 (1960).

IV. IS SECTION 1-407 (a) OF THE PENNSYLVANIA EMINENT DOMAIN CODE REPUGNANT TO SECTION 210 OF THE UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970 AS THE PENNSYLVANIA EMINENT DOMAIN CODE HAS BEEN APPLIED TO THE APPELLANTS?

The Appellants contend that the Pennsylvania Eminent Domain Code, 26 P.S. §1-407 (a) is repugnant to §210 of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, P.L. 91-646, January 2, 1971; 42 USC, §4630, in that it entitles the condemnor to possession of the Appellants' property without any requirement that the condemnor

provide relocation assistance to the Appellants. The Uniform Relocation Assistance and Real Property Acquisition Policies Act does not require the condemnor to provide relocation assistance until the Condemnor has acquired title to the property. The condemnor has not yet acquired title to the Appellants' property. The argument that §1-407 (a) of the Pennsylvania Eminent Domain Code is repugnant to the Uniform Relocation Assistance and Real Property Acquisition Policies Act cannot allegedly be asserted since condemnation or sale is a prerequisite in the eligibility for relocation benefits. See Condemnation of 4150-52 East Thompson Street, 64 D & C, 2d, 306, 309, 310 (1973).

CONCLUSION

WHEREFORE, the Appellee respectfully submits that the questions upon which this case depends are so unsubstantial as not to need further argument and Appellee respectfully moves the Court to dismiss this Appeal or, in the alternative, to affirm the judgment entered in the case by the Supreme Court of the Commonwealth of Pennsylvania.

Respectfully submitted,

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